GAN BOON KYEE

v.

YAP HONG SIN & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABU MANSOR ALI JCA
DENNIS ONG JCA
[CIVIL APPEAL NO: W-02-1-95]
13 MAY 1997

CIVIL PROCEDURE: *Judgments and Orders - Declaratory relief - Order made after consideration of evidence but in absence of appellant - Whether properly granted - Whether a default judgment*

CIVIL PROCEDURE: *Action - Application for stay and extension of time - Delay of five months - Whether applicant slow in moving Court - Refusal to grant application - Whether a proper exercise of discretion*

In the Court below, the respondents in this case had taken out a summons wherein they applied for a certain declaration against the appellant and some others. The appellant and the other defendants had all entered appearance, and had also exchanged affidavits before the return date of the summons. The appellant and his Counsel, however, were absent when the matter was being called, and the learned Judicial Commissioner, having heard the submissions and evidence of the parties who were present, granted the declaration sought for. The appellant did nothing for about five months after becoming aware of the declaratory order, but thereafter applied for an extension of time and a stay of the order. The application was rejected and the appellant hence appealed to the Court of Appeal. The sole issue that arose was whether the learned Judicial Commissioner, in rejecting the appellant's application, had exercised her discretion erroneously.

Held:
Per Gopal Sri Ram JCA

[1] The order was not the mechanical act of the learned Judicial Commissioner but a pronouncement made after consideration of the evidence and submissions. The learned Judicial Commissioner was therefore correct in her observation that this was not a judgment in default.

[2] The learned Judicial Commissioner was also correct in classifying the conduct of the appellant as 'leisurely paced' because of the sluggish pace at which the appellant moved the Court. It is axiomatic that the law assists the vigilant and not the indolent.

[3] The learned Judicial Commissioner had taken into account all relevant considerations, had directed herself correctly on the law and had also asked herself the right question. She had therefore exercised her discretion correctly.

[Appeal dismissed. Order of Judicial Commissioner affirmed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Penghakiman dan perintah - Perintah perisytiharan - Perintah dibuat selepas meneliti keterangan tetapi tanpa kehadiran perayu - Samada diberi dengan betulnya - Samada suatu penghakiman ingkar*

PROSEDUR SIVIL: *Guaman - Permohonan untuk penggantungan dan perlanjutan masa - Kelewatan selama lima bulan - Samada pemohon lembab dalam menggerakkan Mahkamah - Keengganan untuk membenarkan permohonan - Samada suatu penguatkuasaan budibicara yang betul*

Di Mahkamah di bawah, responden di sini telah mengambil satu tindakan saman di mana mereka memohon untuk mendapatkan suatu perisytiharan terhadap perayu dan beberapa orang lagi. Perayu dan defendan-defendan berkenaan masing-masing telah memasukkan kehadiran mereka, dan telah juga bertukar afidavit sebelum tarikh pemulangan saman tersebut. Perayu dan Peguamnya, bagaimanapun, gagal hadir sewaktu kes tersebut dipanggil, dan Pesuruhjaya Kehakiman yang bijaksana, setelah mendengar hujah dan keterangan pihak-pihak yang hadir, membenarkan perisytiharan yang dipohon. Perayu tidak berbuat apa-apa selama lebih kurang lima bulan setelah mengetahui tentang perintah perisytiharan tersebut, tetapi selepas itu telah memohon untuk perlanjutan masa dan juga perintah penggantungan. Permohonan perayu ditolak dan perayu merayu kepada Mahkamah Rayuan. Persoalan tunggal yang berbangkit ialah samada Pesuruhjaya Kehakiman yang bijaksana, dalam menolak permohonan perayu, telah melaksanakan budibicaranya dengan cara yang salah.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Perintah berkenaan bukanlah suatu tindakan mekanikal oleh Pesuruhjaya Kehakiman yang bijaksana, tetapi adalah merupakan suatu perisytiharan yang dibuat setelah meneliti keterangan dan juga hujah. Pesuruhjaya Kehakiman adalah betul dalam pandangannya bahawa ini bukanlah suatu penghakiman ingkar.

[2] Pesuruhjaya Kehakiman yang bijaksana adalah juga betul apabila mengkelaskan perilaku perayu sebagai ‘leisurely paced’ disebabkan oleh

kelembapan perayu dalam menggerakkan Mahkamah. Sudah menjadi hakikat bahawa Mahkamah akan membantu mereka yang sentiasa berawas dan tidak mereka yang malas.

[3] Pesuruhjaya Kehakiman yang bijaksana telah mengambil kira kesemua faktor yang berkaitan, telah mengarahkan dirinya secara betul berhubung perkara undang-undang dan telah juga bertanyakan soalan yang wajar. Beliau dengan itu telah melaksanakan budibicaranya dengan betul.

[Rayuan ditolak. Perintah Pesuruhjaya Kehakiman disahkan.]

Other source referred to:
The Declaratory Judgment, Zamir & Woolf, 2nd Edn., p. 264

[Appeal from High Court Malaya, Kuala Lumpur; Originating Summons No: S2-24-174-91]

For the appellant - Charles Hector; M/s Wee Choo Keong & Faaiz
For the respondent - Yusuf Khan bin Ghows Khan; M/s Yusuf Lee Pathma & Marbeck

JUDGMENT

Gopal Sri Ram JCA:

The present appeal is by the first defendant in the Court below against the refusal by the learned Judicial Commissioner to extend time to make an application for extension of time and for a stay of a declaratory judgment entered on 5 May 1993. The appellant's summons initially carried a prayer to set aside the declaration in question. However, the summons was later amended and this prayer was deleted. What remained before the learned Judicial Commissioner was only the application for extension and stay.

The brief facts relevant to the appeal may be shortly stated.

On 16 October 1979 the second defendant in the Court below as vendor and the respondents as purchasers entered into a sale and purchase agreement for the purchase of a house situated on the land held under EMR 5132 for Lot 1935 ('the said property').

The appellant is the registered proprietor of the said property. Apart from the house in question there were six others which do not concern us in the present appeal. The basis upon which the sale and purchase was transacted was that the second defendant was beneficially entitled to the said property under a trust deed dated 25 October 1979.

On 27 October 1992, the respondents took out an originating summons for a declaration that the defendants thereto held the said property in trust for the respondents. The originating summons came on for hearing on 5 May 1993.

It had been served before then on the appellant and the other defendants to the action all of whom had entered appearance. The parties had also filed and exchanged affidavits before the return date of the summons. However, on the matter being called the appellant and his Counsel were absent.

The Judicial Commissioner hearing the case granted the relief sought by the respondents in their summons. The order extracted from the Court's registry reveals that arguments for and against the application were heard from Counsel for the respondent as well as Counsel for the third and fourth defendants and that the affidavits filed had been read. In other words, the order was not the mechanical act of the learned Judicial Commissioner but a pronouncement made after consideration of the evidence and submissions.

Returning now to the chronology, the appellant after becoming aware of the judgment on 14 October 1993, did nothing until 24 March 1994. The learned Judicial Commissioner has in her judgment alluded to the events that transpired between these two dates and the steps taken by the appellant in that time frame. I therefore do not propose to regurgitate the details as no useful purpose would be served by repetition.

On 24 March 1994 the appellant filed his application to which I have referred in the opening paragraph of this judgment. In the affidavit in support of his summons, he set out the explanation for the delay in making his application. The learned Judicial Commissioner after considering the explanation proffered, rejected it and refused the extension sought.

Before us Encik Hector, Counsel for the appellant, has criticised the learned Judicial Commissioner's reasons and advanced a number of grounds in support of that criticism. They all may be summed up in one sentence. It is that the learned Judicial Commissioner exercised her discretion erroneously.

I have read the judgment of the learned Judicial Commissioner with great care, bearing in mind that this is not the case of an ordinary judgment in default but one of declaratory relief. As observed by Zamir & Woolf, on *"The Declaratory Judgment"* (2nd Edn.) at p. 264:

> ... Courts will generally be reluctant to grant a declaration as part of a default judgment in the absence of any evidence and argument. Before the Court grants a declaration it wants to be sure, as in the case of an injunction, that it is appropriate to grant that relief.

As I earlier observed, the order dated 5 May 1993 makes it clear that the declaratory relief sought for in this case was not granted in default but after consideration of evidence and argument. I am therefore in agreement with the

learned Judicial Commissioner in her observation that this was not a judgment in default.

Further, she was entirely correct in classifying the conduct of the instant appellant as "leisurely paced" because of the sluggish pace at which the appellant moved the Court. It is axiomatic that the law assists the vigilant and not the indolent.

At the end of the day it all boils down to whether the learned Judicial Commissioner exercised her discretion correctly. In my judgment she did. She took into account all relevant considerations; she directed herself correctly on the law; she asked herself the right question, and her decision accords with the justice of the case.

I am entirely unconvinced with the arguments in support of this appeal. I would therefore dismiss the appeal with costs and affirm the order of the learned Judicial Commissioner. By consent of Counsel before us, the costs of this appeal is fixed at RM1,000. The deposit paid into Court by the appellant shall be paid out to the respondent to account of his fixed costs.

Abu Mansor Ali JCA:

I agree that this appeal should be dismissed for the reasons given by my learned brother.

Dennis Ong JCA:

I concur.

Reported by WA Sharif